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ABSTRACT

The first part of this essay argues specifically that legal speech acts are not statements but question/answer constructions. The focus in this section is on the underlying interrogative structure of the legal decision. The second part of the paper touches on significant topics related to the concept of legal speech acts, including the philosophic notions of speech acts, the influence of these philosophic notions on linguistic analyses of speech acts, an overview of F. W. Maitland's famous study on the forms of action in English law (especially as the study pertains to the interrogative construction of decisions), and a discussion of some of the basic tenets found in David Rayfield's "Action: An Analysis of the Concept." (RL)

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LANGUAGE AND LEGAL SPEECH ACTS: DECISIONS

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We know that the concept of Speech Acts has, in recent years, been of major concern to linguists engaged in analysis of context-sensitive discourse. Philosophic interest in Speech Acts derives from a longstanding tradition in which Ethics and Law were originally interrelated. In this century, assuming that human conduct is predisposed by language, the philosopher John L. Austin introduced the term, Speech Acts. His work has been germinal in this area of philosophic concern. Modern Semiotics, developed largely on pragmatic methods of inquiry in Charles Sanders Peirce, analyzes structures of communication which are understood to be complex systems of sign relationships. Such a system is natural language. Another such system is the Legal System. Legal Semiotics is one of the most recent branches of general semiotics to evolve; it is from this perspective that I will be speaking.

In a recent work (1981a) I introduced the notion of Legal Speech Acts. Here I will specifically argue that Legal Speech Acts are not statements, but are question/answer constructions. My focus is particularly on the underlying interrogative structure of the Legal Decision. I will not attempt here either a linguistic or logical analysis of Decisions. Because the concept is new, my paper proceeds in the form of general discussion.

Lawrence Friedman (1975) tells us that legal acts are both verbal and nonverbal. A nonverbal legal act, or sign, may be a badge, a uniform, a system of traffic signals, or even a legal environment such as a court which traditionally conveys

its message through certain structural features which set it apart from everyday spaces and events (cf Kevelson, 1977). Of verbal legal acts, there are three kinds: 1) Rules; 2) Commands or Requests; 3) Decisions, (cf Friedman, 1975:26-44).

All legal acts are messages; a legal system is a process of communicating such messages through Legal Speech Acts. Here I will not be talking about that technical, idiocyncratic sublanguage system known as "law language", although the application of semiotic methodology to the semantic and syntactic levels of legal argument, and law language in general, would be a fruitful undertaking. Actually, our whole understanding of the uses and meanings of arguments requires that we apply semiotic Methodology, a term Peirce uses synonymously with Speculative Rhetoric, to practical argument, ((cf Kevelson, 1977; 1980; 1981a; 1981b; C.S.Peirce, CP 3.160; CP 2.105; CP 4.615; CP 4.116; mss 645:19; 754:8; 311;11-16; 312; 622:2; 425A; 425B:18; 95:7)). Toulmin, for example, considers the legal argument prototypical of all ordinary argument, (1958); and Perelman discusses the basic intercommunicative functions of modes of "the new rhetoric" in argument, 1969). But, (as Friedman points out), there has been no systematic study of the pragmatic level of law language, or Legal Speech Acts I might add, in which Speaker, Listener, Code, Channel, Message, and Context are coordinates in a Legal Event. From the viewpoint of Semiotics, the three levels of a communicative event are syntactic, semantic, and pragmatic, (cf Morris, 1946).

I am mainly concerned here with the pragmatic level of the Legal Speech Act, Decisions, and will discuss only in passing linguistic and philosophic interest in the semantics of Speech Acts as "meaning", in ~~this~~ the sense that has to do with propositional attitudes and the relationship between Law and Ethics. Of note, in that division of his semiotic philosophy Peirce designates as the Normative Sciences, we find the subdivisions of his Grand Logic as 1) Speculative Grammar, 2) Logic -- a relative logic -- which subsumes abductive or hypothetical reasoning, Critic, or deductive, formal reasoning, and inductive reasoning, and 3) Methodology (Methodeutic or Speculative Rhetoric), In this Peirce's scheme, Logic is predetermined by Ethics, and Ethics depends upon Esthetics, which he comes to understand as the "science of value."

It is hoped here that this digression into some basic principles of Semiotics will cast the current controversy over the definition of the term "act" in legal and ordinary conduct in a new light. Jurisprudential and philosophic concern with the "act" centers on how volition, action, and value derived from felt wishes and desires, are interconnected. Briefly, I will present the jurist John Austin's (1879) definition of the term "act" and will also refer to Mead's Philosophy of the Act (1938). Rayfield's thesis, which holds that choices, decisions, and acts are equivalent and interchangeable, and which opposes the now prevailing "additive analysis" of acts in legal theory, as developed by John Austin, has important bearings here; it supports the notion that a legal decision

is not a consequent stage of the juridical (or ordinary) decision-making process, but rather, that the decision is a coherent question-answer unit of language, in which the question part may be below the surface, i.e., ellipsed but implied, (cf Rayfield, 1972). In recent years Sanders called attention to the fact that "there are...linguistic constructions which are clearly larger than the sentence, which include sentences. One such construction is the question-and-answer exchange, or what might be called the interrogative dialogue," (cf Sanders, 1969: 38-39; Kevelson 1977, 1978).

Sanders is not original in his observation. We find the Stoics distinguishing various kinds of Lekta, or complete units of verbal meaning: e.g., a proposition is one kind of complete meaning structure; another is the question. The answer by itself was regarded as an incomplete unit of meaning. I will not describe some advances in the last twenty years on the logic of questions and answers, but make available significant references on this topic.

Neither will I be talking about the kind of Legal Speech Act called rules, except to say that rules are communicated in two distinct kinds of messages: 1) substantive, in which the message is directed to the general public or special-interest public group, and 2) jurisdictive, in which the message is exchanged between authoritative, official legal actors. Nor will I be focusing, except in a minimal way, on the kind of Legal Speech Act called Commands, or Requests, except in passing, and where brief discussion may help point up the interrogative in Decisions.

E.g., There is a widespread tendency to analyze legal discourse from the point of view of deontic logic, the logic of permission and obligation. There is no doubt that John Austin's 19th century concept of the law, as command of the Sovereign, which while highly controversial today, nevertheless seems to justify regarding legal language as a construction of imperatives and commands. The work of Rescher, for example, (1966) and others suggest that legal discourse is predicated on the theme that the law is a tool, instrumental in bringing about social conformity to its leading principles, encoded law. The fact that a command signifies an order and is deontic in this respect does not warrant regarding all of Legal Speech Acts as having an underlying deontic logic. On the contrary, one can consider the Rule and the Command as signs of certain verbal structures which, through their rhetorical force, and their structural similarity to actual propositional-<u>like</u> rules and directive-<u>like</u> legal commands, convey a stylistic meaning. It should be recalled in this context that Peirce considers all proposition-like statements, including non-propositions such as imperatives, to be at bottom, hypotheses. For example the word, "Let" which prefaces Writs in early English Law and which has come to mean both <u>permit</u> and <u>restrict</u> originally indicated that a question of possibility, that a "may-be" rather than a "would-be" was implied by the plaintiff. Similarly, the word "if" such as in the if...then conditional, derives in English from the word meaning Gift, or Given, while the Given is understood in positive law as that which is axiomatically encoded in Law,

the earlier meaning of Given (that) was always dependent on an antecedent question, i.e., "it is possibly the case" or "there is a question of" followed by the disjunctive "but" and the exploration of one or another possible alternative.

Unlike the Rule kind of Legal Speech Act which Friedman says is a General, i.e., which represents, as a sign, a Given, and conveys an axiomatic or truth-like rhetorical force, the Command and the Decision are particular. In terms of traditional grammar, the Command and the Decision are predicated on the subject of inquiry, the Rule. Or, in a logical sense, the Rule functions as a Type and the Command and the Decision are Tokens of that Type. But according to Peirce's relative logic the old subject/predicate and type/token relationships do not hold; as we will see, a Decision can become a new precedent, and thus a new Subject or Type, in subsequent cases. I will talk a bit more on the shifting role of provisional judgments later.

It is customary to say that the Command and the Decision are not axiomatic, and that, in general, imperatives and questions cannot be analyzed as truth-statements in formal logic; however, as Susan Haack (1978:84) suggests, the truth conditions of imperatives and interrogatives may be satisfied by considering the consequential truth of question or directive. Thus the result, in a pragmatic sense, of a command or a question yields an accomplished fact which can be verified as true. Now it is not possible here to fully examine Haack's suggestion except to note that by regarding the result of a

question or a command as a truth sign, or proposition, we would be only perpetuating the prevailing tendency toward "additive analysis" of legal and other acts. In this theory the consequence is a second stage derived from the first; the decision would be a discrete unit subsequent ~~on~~ to its antecedent. Actually, however, by regarding the ~~deliberation~~/decision process as complementary units of a single act, such as the question/answer is a complete, unified meaning structure of language, we will have introduced a radical, more satisfactory way of accounting for acts.

There is another, important distinction in the surface structure of Decisions and Commands. A command presumably expresses the will of authority which must be carried out without discussion or debate, while the Decision is markedly a response to a claim, or question-as-complaint, against the accused. Further, as we will see, in relatively open legal systems a legal decision by an activist judge is also a response to public sentiment, and to the extant common value of his referrent society. Still further, in the inner dialogue which involves the judge's questioning and interpreting the case with reference to established rule, and in selecting one alternative from other possible alternatives, the process of judicial inquiry is clearly a dialogue of questions and answers. Finally, unlike the Rule or Command, at least in Anglo-American courts, the legal Decision may be appealed; that is, ~~they~~ it may be questioned by either party involved in the litigation.

Worth mentioning, a Decision may avoid appearing as a question when there is rescrt to the device of the legal fiction.

Again, in Shklar's sense (1964) the use of the "legalism" may conceal an innovative decision within the appearance of maintaining the stability of the legal order.

As Friedman says, "A fiction is phrased so as to look as if the court merely follows old and legitimate ways. Legal fictions form a bridge between ideology and fact, when an institution asserts either that less change has taken place or more than is actually true," (supra: 262). As for legalisms, especially in relatively closed legal systems in which legal reasoning assumes the mode of formal logic, "the blocks of legal reasoning are propositions which serve as premises." (supra: 237).

When a decision is said to be based on, or validated by, fixed legal premises, of which in any closed system there are a finite number, distinctions are sharply made between propositions which are legal and those which are not. Although the notion of "legalism" refers primarily to non-existing legal premisses, as though they existed, a maximally open legal system goes one step further and does not distinguish at all between legal and nonlegal propositions. Here, in this ideal open system, the judge makes and not merely "discovers" law, (cf Kevelson, 1981a).

Of interest is the fact that a Legal Code has been regarded as the "mirror" of society, (cf Dietze, 1964:63-88). It is, in other words, the iconic sign, or Subject of the continuous discourse in a legal system. That which is predicated of it -- the Legal Acts -- are indexical signs. But we want

to recall that in the dynamic process of developing an idea, or any continuous idea such as the concept of the Law, sign-functions shift with reference to shifting contexts. Thus, from this perspective, the Laws from which the Rules are inferred are also questions.

In point, in "The Origins of Western Legal Science" Berman (1977) shows that the medieval lawmen understood problems in the Codex, or Codes of Law, to be questions of law, or questiones. He discusses at some length the process of questioning the law, (supra: 906-909) and says that "Dialectical reasoning is distinguished above all by the fact that it does not start with 'propositions', that is, with declarative statements that must be either true or false, but rather with 'problems,' or questions about which people may differ, although ultimately the disputed question will be resolved conclusively by a proposition, or first principle, in favor of one side or the other if valid methods of dialectical reasoning are used," (supra: 911). He also adds that it was the Roman jurists who changed the process of the Greek dialectic "from an art of discovery (ars inveniendi) to an art of judging (ars iudicandi)," (supra: 916).

Again, it is to Peirce that we owe the understanding that all feeling -- impression as well as conviction and belief -- are actually signs of value judgments, or Interpretant Signs, throughout any given process of inquiry. A Legal Decision, at each stage of the continuum of Law appears as a symbolic kind of sign, or a "legisign" in Peirce's sense. Actually, in each case of inquiry, the final judgment is always provisional,

and passes, in function, from predominantly symbolic sign to predominantly iconic sign, or Subject/Theme of a subsequent argument or inquiry.

In this context we can suggest some clarification of the concept of stare decisis. Particularly in Anglo-American legal systems, the legal speech act, Decision, rests on at least two distinctive "ideal" procedures. The first is procedure by precedent, which requires that in each particular case the judge must appeal to existing, relevant rule, i.e., to that which is inferred from the Code. The second of these two ideal procedures may be described, following Wasserstrom (1961:7), as procedure by equity in which the judge decides the particular case by "appealing to that which is just or equitable for the particular case." Still a third procedure, suggested by Wasserstrom, is one we identify with relatively open legal systems; this third procedure does appeal to established rules for precedent, but in each case it is not bound by precedent. Neither is equity in itself a sufficient condition for decision. But the judge acts as an ideal legislator (in Geny's sense, 1899) and refers to his own personal values which presumably reflect or mirror general social claims and values, and thus acts as a legislator might if the present facts of the social context had been known at the time of legislating. The judge in this case conserves the Code; but in actuality the innovative decision introduces new law based on the judiciary response to the implied or articulated questions of society.

In passing, it should be mentioned that Peirce's relative logic and his semiotic Methodology provided the jurist Geny with precisely the material and theoretical tools he needed to introduce what has become known in this century as Legal Realism. (cf Kevelson, 1981c)

The concerns of philosophy, linguistics, and law have traditionally been intertwined. The methods in each case distinguish the disciplines; a method of inquiry has to do only incidentally with the sharing of certain data, e.g., legal speech acts, but essentially with the kinds of questions which are raised in response to these data. Charles Morris has defined, for example, Semiotics' Methodology as the inquiry into inquiry, (1932). (cf Bochenski, 1965).

It has become commonplace that philosophers and linguists each recommend that their respective analyses of Speech Acts be applied to legal procedure, e.g., (Rayfield, supra). The irony, of course, is that just as Ethics cannot be separated from legitimized conduct, the idea of Acts -- of Legal Speech Acts -- continues to reveal its initial implication in Law. We recall, for example, the bifurcated concept of Law in Aristotle which holds that, on the one hand, the purpose of Law is to effect compliance with such legal instruments that represent the will of society; and on the other hand, that Law aims to bring about justice. As positive law evolved, particularly in the late 18th and 19th centuries, law and ethics, or morality, became again conceptually opposed. Now again, we find that the Legal Act presupposes ethical moral conduct; this conduct, according to John Austin, must be externally observable, yet it derives from wishes and

desires and the needs to realize one's wants in social intercourse, i.e., from Questions. Austin's emphasis, as in other theses on positive law, ~~it is~~ assumes that the will of the people will coincide with the ideal Code of Law, as commanded. ~~Whereas,~~ But in Common Law, the legal system is clearly a system, or instrument, directly responsive to the wishes of the people. The basic underlying principle of the controversial concept of "the social contract" is again revived in modern "legal realism."

The concluding part of this paper will touch on a few significant topics, in the following order: First, I briefly discuss some of the philosophic notions of Speech Acts which influenced the now abundant literature on linguistic analyses of Speech Acts, e.g., Sadock (1974), Longacre (1976), Kevelson (1977, 1978, 1981b), Kuno (1972), Bennett (1977), Karttunen (1977), Lyons (1977); Second, I give an overview of Maitland's famous study of the forms of action in English Law, especially as his study pertains to my interest here in legal speech acts and to the interrogative construction of Decisions; Third, in a few words I attempt to summarize some basic tenets of Rayfield's Action: An Analysis of the Concept (supra).

As mentioned, it is customary to credit the philosopher J.L. Austin with introducing the term Speech Acts into our vocabularies. As Lyons notes (1977:727), J.L. Austin challenged "the restrictive view of meaning held by the logical positivists, according to whom the only fully meaningful utterances were

empirically verifiable statements..." The linguistic concern with Speech Acts countered the early Chomskean view which excluded "meaning" from language analysis, and adopted his revised position in which he maintains that a theory of "generative grammar must provide a general, language-independent means for representing the signals and semantic interpretations that are interrelated by the grammars of particular languages," (Chomsky, in Searle 1971:71-82).

J. L. Austin's concern, as we recall, relates to a philosophical perspective which holds that human conduct is determined by the underlying verbal structure of natural language, and that a study of speech acts is really a study in human interrelationships and human goals as signified by ethical concepts and values. In the 1960's J.L. Austin defined action as the goal of deliberate purpose. Austin says here that the Aristotelian problem of The Good, with which ethical behavior has been confused, has led to problematic distinctions in language between statements that have a so-called truth-value, i.e., substantives, and utterances which may or may not be true but which effect interpersonal communication; this latter he called performatives.

The study of Speech Acts is the study of performatives. (cf J.L. Austin, 1969: 1-31; 1975). Austin asks what makes a statement true. Further, he says that there are some statements which are not statements at all, in the sense of being analytical, i.e.. derived from true premises from which true consequences may be inferred. Speech Acts are communicative

acts because we require that there be a shared system of conventionalized verbal signs which a speaker can produce at will and which an audience can "observe" or understand, ("Truth" in PP, supra: 121).

A statement is not a statement "When it is a formula in a calculus: when it is a performatory utterance: when it is a value-judgment: when it is a definition: when it is part of the work of a fiction..." (ibid: 131). Austin did not add that a statement is not a statement when it is an answer to an implied or explicit question, such as a definition. (cf Caws, 1959). In this context it is worth mentioning that Peirce distinguishes between an immediate action which refers to ethical standards and signs, and a projected or imagined action which refers to ideal goals and aesthetic values, (CP 7.201; 1.591-2).

It is evident in many works on Speech Acts in both linguistics and philosophy that the legal model is often implied in analyses of Speech Acts. This is especially apparent in Grice (1968) and to a lesser extent in Searle (1969). One might say that an obverse analogy holds, namely that just as the legal argument is the prototype of arguments in general, the Legal Speech Act is prototypical of Speech Acts in general.

So deeply is it engrained in Western thought that only responsible people act, and thus only "actors" are legal entities, whereas irresponsible people merely behave, that it is easy to see how the principle actors of a society came to be identified with authoritative, official legal actors: these legal actors comprise the agents of a legal system, the highest-ranking of whom is the judge.

According to this understanding only legal persons, i.e., persons recognized as responsible under law, do legal acts. Maitland's book, coming at the turn of the century (1909) is remarkable in its attempt to systematize the forms of action in English Common Law, so that we understand each action-form as a particular kind of sign structure with characteristic functions and styles, each with respect to the context of the larger, ideal process called the Legal System.

Although each action has its own process of originating, of concluding, of formulaic utterances, e.g., in pleas, trials, amd judgments or decisions, all actions in English law share in common basic features: "It is not enough that in some way or another (a man) should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled," ((1909) 1971:1-9). Maitland speaks of eight levels of questioning, each described as a form of action: from the time a plaintiff considers presenting his case to official legal actors to the termination of the legal sentence imposed by the deciding judge. An act in this sense is a consequence, or decision, at every stage of the legal procedure, (and corresponds to what Peirce's Methodology attempts to explain.)

Following the Judicature Act of 1873 the rules which were supposed to underlie the Forms of Action were ultimately disparaged, Maitland says. It is around this time, as we recall, that the period of modern law begins, in which law and justice become opposed and not "administered concurrently," (supra:7).

Maitland goes on to say that, following this Act English Law "no longer...knows a certain number of actions and no more, or that every action has a writ appropriate to itself; the writ is always the same, the number of possible endorsements is as infinite as the number of unlawful acts and defaults which can give one man an action against another...there may be as many forms of action as there are causes of action," (supra:5).

A few remarks in closing: Following H.L.A. Hart's distinction ("Ascription of Responsibility and Rights, 1963) between doing and acting, Rayfield argues against John Austin's concept of voluntary action as a willed obedience to Command, and against his "additive analysis" of acts, referred to earlier.

Rayfield suggests that a theory of acts must include a more satisfactory approach to omissions, or Forbearances in law, and must include, as John Austin did not, acts which are not external but which refer to internal dialogues and deliberations. As noted, Rayfield says that a choice and a decision are one and the same. Also, that a choice, a decision, and an action considered as an answer to an implied question in decision-making, are but different aspects of the same act. "Decision, as well as choice, is an intermediate between deliberation and action," (supra: 27-37). Rayfield correctly notes that there is a problem in talking about acts, e.g., to say that X did Y is merely descriptive of an act in ordinary language; but to say X did Y in legal discourse is prescriptive, i.e., presuming the head legal actor finds the accused guilty of such and such, and utters the selected decision, the decision carries with it the whole ensuing consequence of legal action against the guilty

person. Peirce describes this process as a "continuous predicate"; I discuss this aspect of hypotactic discourse structure in Kevelson, 1981c.) This prescriptive aspect of a legal decision in referring to an act does, as Hart points out, "ascribe responsibility," (cf. Rayfield, supra: 42, 43).

In concluding, I suggest that further study of Legal Speech Acts, particularly the Decision in modern courts of law, must deeply question whether nonresponsible persons, in the traditional legal sense, can perform legal acts; if they cannot, as in the case of young children, question their rights, or as in the case of incapacitated persons, or convicted criminals, be considered responsible persons, how does the court talk about their acts? The kinds of Decisions the courts will make will indicate, as answer, the nature and complexity of the question the Legal Actor investigates.

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